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IN THE

Supreme Court of the United States

October Term, 1968

No. 267

NEBRO JOHNSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

WILLIAM H. OLTARSH,
Attorney for Petitioner,
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New York, N. Y. 10007.

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1. (A) Judgment of conviction after trial of the crimes of Disorderly Conduct (Penal Law, Sec. 722(c), Assault in the third degree (Penal Law, Sec. 244), and Resisting Arrest (Penal Law, Sec. 1851), was unanimously affirmed without opinion by the Appellate Term of the Supreme Court of New York, First Judicial Department. The judgment was reported in the New York Law Journal on the 17th day of January, 1968. The reported decision was numbered 700. A copy of the report appearing in the Law Journal is appended hereto and marked Exhibit "A".

On the 21st day of March, 1968 Honorable John F. Scileppi, Associate Judge of the Court of Appeals of the State of New York, certified that upon application timely made by appellant for a certificate pursuant to Section 520 of the Code of Criminal Procedure, no question of law was presented which ought to be reviewed by the Court of Appeals, and permission to appeal was thereby denied. A

copy of the Certificate denying leave is hereby appended marked Exhibit "B".

(B)(1) Defendant was convicted on the 18th day of July, 1967.

(2) No order respecting a rehearing and no order granting an extension of time within which to petition for certiorari has been granted.

(3) The Court has jurisdiction to review the judgment of conviction because the conviction is repugnant to the due process clause of the 14th amendment of the Constitution of the United States and Article IV, Section 2.(1) of the United States Constitution.

(C)(1) Does appellant's conviction of Disorderly Conduct (Penal Law, Section 722(6)) violate the due process clause and Article IV, Section 2(1) of the United States Constitution in that the State failed to prove on trial an actual breach of the peace, and Section 722(6) of the Penal. Law does not require an actual breach of the peace for a conviction?

(2) Is the language of Section 722(6) of the Penal Law of the State of New York, to wit, "with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned," vague and ambiguous so as to fail to create a clearly defined and ascertainable standard of conduct, thereby rendering the statute unconstitutionally vague?

(3) Was appellant entitled to use such force as is necessary to resist an arrest made pursuant to an unconstitutional statute?

(D) AMENDMENT XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE IV

Section 2. (1) The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Penal Law, Sec. 722. DISORDERLY CONDUCT

Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

6. Interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocket, pocketbook or handbag.

Penal Law, Sec. 244. ASSAULT IN THIRD DEGREE

A person who: 1. Commits an assault, or an assault and battery, not such as is specified in sections two hundred and forty and two hundred and forty-two . . ."

Penal Law, Sec. 1851: RESISTING PUBLIC OFFICER IN THE DISCHARGE OF HIS DUTY

A person who, in any case or under any circumstances not otherwise specially provided for, wilfully resists, delays, or obstructs a public officer in dis-

charging, or attempting to discharge, a duty of his office, is guilty of a misdemeanor.

(E) The appellant was arrested by a plainclothes detective after he was allegedly observed placing his hand inside a woman's pocketbook as she was boarding a northbound train at 59th Street and Lexington Avenue. After the arrest and while appellant and the detective were ascending an escalator, appellant tried to escape. During the attempt to escape, appellant punched and bit the arresting officer. A uniformed officer intervened, and the two officers subdued appellant.

At the trial the detective admitted that when appellant placed his hand inside the lady's pocketbook, no disturbance or commotion was caused, and that no breach of the peace had taken place before the arrest.

(F) The federal questions were first raised on appeal to the Appellate Term in the appellant's brief. The appeal was dismissed without opinion.

On a motion to dismiss at the trial, appellant argued to the Trial Judge that the law of the State of New York had only applied Section 722(6) in those cases where an actual breach of the peace had occurred and that such strict construction was required in order to preserve the constitutionality of Section 722(6). The Trial Court in finding defendant guilty thereby applied this statute unconstitutionally and thereby raised the federal question at the time of conviction by applying the statute to this defendant in an unconstitutional manner.

(H) Section 722(6) purports to make conduct which is admittedly not disorderly, disorderly conduct. This, in effect, robs words of their meaning. The words of Justice Frankfurter seem applicable to the statute: "Definiteness

is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense". *Winters* v. *People of the State of New York*, 333 U. S. 507, 92 L. Ed. 840. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids". *Champlin Ref. Co.*, 274 U. S. 445, 458. "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law". *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391.

The statute is also repugnant to due process because in order for conduct to be disorderly it must rise to a level of a breach of the peace. It must "menace public order and tranquility". *Cantwell* v. *Connecticut*, 310 U. S. 296, 308.

Resistance to arrest is not a crime if the arrest was not lawful (*People* v. *O'Connor*, 257 N. Y. 473, 178 N. E. 762), "the one limitation on its exercise (force) being that the victim may not pursue his counterattack merely for the sake of revenge or the infliction of needless injury". *People* v. *Cherry*, 307 N. Y. 308.

The People proved no intent for revenge or needless injury greater than that necessary for appellant to escape his unlawful arrest.

Respectfully submitted,

WILLIAM H. OLTARSH,
Attorney for Appellant.

To:

FRANK S. HOGAN, ESQ.,
District Attorney, New York County.

EXHIBIT A

Affirmance by Appellate Term of the Supreme Court of New York, First Judicial Department

New York Law Journal, Jan. 17th, 1968

Judgment of conviction unanimously affirmed. No opinion.

EXHIBIT B

Certificate Denying Leave to Appeal by Court of Appeals of the State of New York

STATE OF NEW YORK COURT OF APPEALS

Before:

HON. JOHN F. SCILEPPI,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

against

NEBRO JOHNSON

I, JOHN F. SCILEPPI, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to §520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be

reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Kew Gardens, New York
March 21, 1968

JOHN F. SCILEPPI
Associate Judge

Criminal Court of the City of New York
County of NY—Date April 23 1968
I hereby certify that the within is a true
Copy of the Record on file at this Court.

MILTON (Illegible)
Court Clerk

(Seal)